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Legal Opinion L-2006-17
August 4, 2006

TO: Catherine A. Leyser
Director of Assessment and Training

FROM: Steven A. Bartholow
General Counsel

SUBJECT: Supplemental Pension Plan
Massachusetts Bay Commuter Railroad Company, LLC
401(k) Plan for Non-Bargaining Unit Employees

This is in reply to your request for my opinion as to whether the Massachusetts Bay Commuter Railroad Company, LLC 401(k) Plan for Non-Bargaining Unit Employees (the Plan) is a supplemental employer pension plan which must offset a supplemental annuity under section 2(b) of the Railroad Retirement Act (RRA) as required by section 2(h)(2) of the RRA. For the reasons set forth below, in my opinion this Plan meets the definition of a supplemental employer pension plan based on employer and employee contributions. Consequently a supplemental annuity under the RRA must be reduced by the amount of benefits under the Plan which are attributable to the employer's contributions.

The Massachusetts Bay Commuter Railroad Company (Mass. Bay Commuter), which has been determined to be a covered rail carrier employer under the RRA (BA 1910), has submitted a copy of the summary plan description, and has returned a completed "Request for Information About New or Revised Employer Pension Plan" (Board Form G-88r). The Introduction to the summary plan description characterizes the Plan as follows:

> The Plan is a 401(k) profit sharing plan. The Plan is designed to allow you to contribute a portion of your salary on a pre-tax basis * * *. The Plan also allows your employer to match a percentage of your contributions, and allows your employer to make an additional discretionary profit sharing contribution to the Plan.

Any Mass. Bay Commuter employee not covered by a collective bargaining agreement may participate in the Plan. An eligible employee may elect to contribute up to a stated annual percentage of the employee's total compensation by payroll deductions. The amount contributed is excluded from earnings subject to Federal income taxation. Employees may make additional contributions above annual pre-tax limitation from compensation subject to Federal income taxation. Employee participation in the Plan is not mandatory.

The Plan states that Mass. Bay Commuter will match employee contributions with an equal contribution up to a total of the first five percent of the employee's pre-tax compensation. Mass. Bay Commuter will not match any employee contributions made from compensation subject to Federal income taxation. The Plan further provides that the railroad "in its sole discretion, may make discretionary contributions to the Plan." The Plan description states that the employer made a discretionary contribution equal to a percentage of the employees' compensation for the six month period January through June 2004, and "intends to continue to make a contribution" beginning July 2004 "but is not obligated to do so."

Employees gain a vested right to any employer contributions to their account after one year of employment. The Plan provides for the vested account balance to be distributed on or after the date the

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employee terminates employment, becomes disabled, or dies. The automatic form of payment is a lump sum distribution, which is mandatory if the basis of distribution is disability. Where an employee terminates employment to retire or for other reasons, and the vested contributions total more than $5,000, the employee may elect payment in no more than 15 substantially equal installments. The Plan defines normal retirement age as 65 years old.

The employer also advises that the plan is not reduced by any portion of a monthly annuity under the RRA which the employee may receive, including the supplemental annuity. Mass. Bay Commuter further advises that the Plan was not established pursuant to a collective bargaining agreement, and that it has been approved by the Internal Revenue Service, although a copy of the IRS letter was not furnished.

As you know, supplemental annuities are payable to employee annuitants who meet the entitlement requirements specified by section 2(b) of the RRA in amounts ranging from $23 to $43 per month as calculated under section 3(e) of the Act. RRA section 2(h)(2) of the Act further requires[1] that:

> (h)(2) The supplemental annuity provided an individual by subsection (b) shall, with respect to any month, be reduced by the amount of the supplemental pension, attributable to the employer's contribution, that such individual is entitled to receive for that month under any other supplemental pension plan: Provided, however, That the maximum of such reduction shall be equal to the amount of the supplemental annuity less any amount by which the supplemental pension is reduced by reason of the supplemental annuity.

Regulations of the Board at 20 CFR 216.42(a) define a "supplemental pension plan" for purposes of the section 2(h)(2) reduction as follows:

> (a) What is a private railroad pension. * * * A private pension for purposes of this subpart is a plan that:
>
> (1) Is a written plan or arrangement which is communicated to the employees to whom it applies;
>
> (2) Is established and maintained by an employer for a defined group of employees; and
>
> (3) Provides for the payment of definitely determinable benefits to employees over a period of years, usually for life, after retirement or disability. Such a plan is sometimes referred to as a defined benefit plan.

[1] The supplemental excise tax imposed on employers by former sections 3221(c) and 3221(d) to fund the supplemental annuity account was rescinded effective January 2002 by section 203(b) of the Railroad Retirement and Survivors' Improvement Act of 2001 (RRSIA). See Public Law 107-90 § 203(b) (115 Stat. 878, 891). While RRSIA section 106 also eliminated the separate Supplemental Annuity Account and provided for payment of supplemental annuities from the Railroad Retirement Account, the benefit offset required by section 2(h)(2) of the Railroad Retirement Act was retained. P.L. 107-90 §106 (115 Stat. at 887)

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> (b) Defined contribution plan. A plan under which the employer is obligated to make fixed contributions to the plan regardless of profits (sometimes known as a money purchase plan) is a private pension plan. A plan under which the employer's contributions are discretionary is not a private pension plan under this section.

The Plan under consideration is in writing and is established by a covered employer for a defined group of employees. While the Plan provides for payment after retirement or disability, payments are not definitely determinable benefits payable over a period of years. Consequently, the Plan is not a defined benefit supplemental pension plan as defined by section 216.42(a) of the Board's regulations.

A private pension which does not provide definitely determinable benefits under section 216.42(a) of the Board's regulations may still require reduction of the supplemental annuity under RRA section 2(h)(2) if the plan is a "money purchase plan" The threshold question with respect to the Mass. Bay Commuter Non-Bargaining Unit Plan is whether the employer's commitment to match employee contributions constitutes an obligation to make fixed contributions.

I note that the Plan states it is a "profit sharing plan". Profit sharing plans, which are established to allow employees to participate in the employer's profits, may limit the employer's contributions to "profits", but need not do so. Michael J. Caan, Qualified

Retirement Plans § 3:6 (2006 ed.) In comparison, a "money purchase plan" as referred to by section 216.42(b) provides a benefit based on employer contributions required by a specified formula. 60A Am. Jur. Pensions § 17. For purposes of this memorandum, the primary difference between a profit sharing plan and a money purchase plan is that employer contributions to a profit sharing plan may be discretionary, while employer contributions to a money purchase plan are by definition required. However, a profit sharing plan also may include a formula by which employer contributions are allocated. To avoid confusion where a plan appears to require contributions for purposes of determining under which provision a plan qualifies for favorable tax treatment under provisions of the Internal Revenue Code, the Code therefore requires that a plan identify whether it is a money purchase plan or a profit sharing plan . See 26 U.S.C. § 401(a)(27)(B), added by P.L. 100-647 § 1011A(j)(1) effective January 1986. Pursuant to this Code requirement, the Mass. Bay Commuter Non-Bargaining Unit Plan consequently identifies itself as a profit sharing plan.

Characterization of the Plan as a profit sharing plan under Code section 401(a)(27)(B), however, does not foreclose a determination that employer contributions are required for purposes of RRA section 2(h)(2). In Legal Opinion L-2000-34, I considered whether a plan with similar provisions required a reduction under RRA section 2(h)(2). Specifically, that plan stated the employees may elect to contribute a portion of pre-tax salary to the plan. Section 5.01 of the plan stated employer "shall contribute" to the plan the amount of the participant's "basic" contributions. The employer further "may elect for any Plan Year an additional contribution." I concluded that the plan required the employer to contribute within the meaning of section 216.42 of the regulations.

The Mass. Bay Commuter Plan is not distinguishable in any material way from the plan considered in L-2000-34. Accordingly, in my opinion the Mass. Bay Commuter Plan for Non-Bargaining Unit Employees meets the requirements for a defined contribution supplemental employer pension under section 216.42(b) of the Board's regulations. A supplemental annuity payable under section 2(b) of the Railroad Retirement Act must be reduced by the amount of benefit under the Plan attributable to the employer's contributions.